



Criminal Justice and Accountable Policing in the Organization for Security and Cooperation in Europe

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Abstract

This article is basically concerned with the relationship between criminal justice and accountable policing in the Organization for Security and Cooperation in Europe (OSCE). The aim is to reconsider the issue of accountable policing together with criminal justice perspectives raised in the OSCE based on my knowledge and observation. In this context, the basic information about criminal justice including its perspectives has been given; How criminal justice practices are adopted by the countries has been explained; The concept of accountable policing has been evaluated under the Herbert Packer's model concerned with crime control and due process perspectives, which raised in the OSCE. To conclude, the OSCE would rather look at criminal justice from the perspective of due process than crime control. This approach affects the reconceptualization of accountable policing and the adoption of criminal justice tools. For example, Turkey ineffectively adopted the ombud mechanism in its criminal justice system. The member countries interact with each other in adoption of good practice and tools about that. However, it is vital to reconsider the issue when discussing the future of the OSCE today.

Key words: OSCE, Criminal justice, Accountable policing, Human rights, Turkey.

Özet

Bu makale temel olarak Avrupa Güvenlik ve İşbirliği Teşkilatı'nda (OCSE) ceza adaleti ile hesap verebilir polislik arasındaki ilişkiyle ilgilidir. Amaç, hesap verebilir polislik konusunu, AGİT'te öne sürülen ceza adaleti perspektifleriyle birlikte, bilgi ve gözlemlerime dayanarak yeniden ele almaktır. Bu bağlamda ceza adaleti ile ilgili bakış açıları da dahil olmak üzere temel bilgiler verilmiş; Ceza adaleti uygulamalarının ülkeler tarafından nasıl benimsendiği anlatılmış; Hesap verebilir polislik kavramı, Herbert Packer'ın AGİT'te gündeme gelen suç kontrolü ve yargı süreci perspektifleriyle ilgili modeli kapsamında değerlendirilmiştir. Sonuç olarak, AGİT ceza adaletine suç kontrolünden ziyade due process perspektifinden bakmayı tercih eder. Bu yaklaşım, hesap verebilir polisliğin yeniden kavramsallaştırılmasını ve ceza adaleti araçlarının benimsenmesini etkiler. Örneğin, Türkiye ceza adaleti sisteminde ombudsman mekanizmasını etkisiz bir şekilde benimsemiştir. Üye ülkeler, bununla ilgili iyi uygulama ve araçların benimsenmesi konusunda birbirleriyle etkileşim halindedir. Ancak bugün AGİT'in geleceğini tartışırken konuyu yeniden ele almak hayati önem taşıyor.

Anahtar kelimeler: AGİT, Ceza adaleti, Hesap verebilir polislik, İnsan hakları, Türkiye.

Introduction

The concept of criminal justice simply refers to the system of institutions, laws, and processes designed to maintain social order, prevent and punish crime, and ensure the fair treatment of individuals accused of criminal offenses within a society. It refers to the criminal justice systems, perspectives, components, and tools or mechanisms. It can be said that there are basically six criminal justice systems such as the US, Europe, China, Japan, UK, Saudi Arabia; Six criminal justice perspectives such as the crime control, due process, rehabilitation, restorative justice, equal justice,

non-intervention; Three criminal justice components such as the police and law enforcement, courts and adjudication, corrections; and many tools and mechanisms.

This study, which is concerned with the police and law enforcement component, will examine the relationship between criminal justice perspectives and the issue of accountable and responsive policing in the Organization for Security and Cooperation in Europe (OSCE). The first topic of the Human Dimension Seminar of the OSCE, which was “*Upholding the Rule of law and Due Process in Criminal Justice System*”, held on May 2006, looks at the issue of perspectives in criminal justice within the separation of *Due Process* and *Crime Control* by giving credit to the first one.

It is therefore important to give information about criminal justice perspectives to be able to reconsider the mechanisms on accountable and responsive policing at national and international levels. They will be explained in the following subheadings. However, Herbert Packer’s criminal Justice model will be handled separately in detail due to the priority of this model in the OSCE human dimension. The model’s priority relies on the assumption that accountable and responsive policing should be based on *due process* perspective.

Lastly, the term *accountability* will be examined here. They are of paramount importance to be able to learn how the OSCE states can develop their own criminal justice systems. In the past, Turkey was on the way of establishing the *ombud* system: It has later established it, but it has not worked well because of its ineffective structure. Before passing criminal justice perspectives, it would be better to discuss how the countries have adopted methods and practices from other countries in the areas of criminal justice, including policing, courts, and corrections.

Adoption of Criminal Justice Practices

Not only cross-cultural learning but also adopting successful practices from other countries are significant for all countries. By understanding and appreciating different approaches, the OSCE countries can thus improve their justice systems and promote cooperation and understanding on a global scale. They are interacted in many issues from the human dimension to gender-based violence. As one of the current activities, the OSCE gives importance to enhance criminal justice capacities *for Combating Gender-based Violence in South-Eastern Europe*. In fact, how countries adopt criminal justice practices has been well described as follows in the literature (Dammer, Albanese, 2014:7).

Adoption of Criminal Justice Methods: Countries look to other countries for inspiration and ideas in implementing their criminal justice systems. For example, Japan's low crime rate has been attributed, at least in part, to their community policing methods and the use of small local police stations called kobans. Some U.S. cities, such as Atlantic City, Detroit, and Houston, have modified and implemented these Japanese methods in their own police operations.

Adoption of Criminal Procedure Rules: Many countries adopt the rules of criminal procedure from others. Certain rights, like the right to counsel at an early stage of the criminal process, are becoming nearly universal across justice systems around the world. Additionally, entire legal codes, such as the Napoleonic Code of civil law from France and the German Civil Code, have been exported and significantly influenced legal and criminal justice systems worldwide.

Understanding Other Countries and Cultures: Studying the administration of justice in other countries helps in gaining a broader understanding of different cultures. Ethnocentrism, which is the belief that one’s own country or culture is superior, and all other practices are inferior or foreign, can be a problem if not addressed. By learning about other countries' approaches to crime and justice, individuals can avoid falling into ethnocentric thinking, which can lead to misunderstandings, conflict, and discrimination. It can lead to discrimination and oppression within a country, as well as tensions and conflicts between different countries or ethnic groups.

Criminal Justice Perspectives

The criminal justice perspectives have been well described as follows in the literature. The perspectives include as headings those: Crime Control, Due process, non-intervention, equal justice, restorative justice, rehabilitation (Siegel, Worrall, 2021: 27).

Crime Control Perspective

The key element is the prevention of crime through efficient law enforcement, strict punishment, and the use of incarceration. It seeks to maintain public safety by deterring potential criminals and swiftly punishing lawbreakers.

It emphasizes the primary goal of preventing crime by using criminal sanctions efficiently. It is believed that the public demands protection from dangerous criminals and expects the government to take necessary measures to ensure their safety, making crime control an essential aspect of the democratic process. The philosophy behind crime control suggests that an effective justice system would deter potential criminals from engaging in unlawful activities. Those who still break the law would be promptly apprehended, prosecuted, and punished to discourage any further criminal behavior. The core principles of crime control include efficient law enforcement, strict mandatory punishments, and increased use of incarceration to reduce crime rates. While implementing crime control measures may incur significant expenses, the benefits of discouraging criminal activity justify the costs.

Due Process Perspective

This perspective advocates prioritizing fairness and the protection of individual rights in the justice system. They argue for impartial hearings, competent legal representation, and equitable treatment to ensure that accused individuals are treated fairly under the law.

Supporters of the due process perspective in criminal justice argue that the primary focus of the system should be treating all accused individuals fairly. This entails providing unbiased hearings, competent legal representation, equitable treatment, and reasonable penalties. The use of discretion within the justice system should be closely monitored to prevent discrimination based on race, religion, or ethnicity. The system must also uphold human rights and civil rights.

Due process proponents emphasize that the justice system remains an adversarial process, where a powerful state faces off against an individual accused of a crime. Without a commitment to justice and fairness, defendants without adequate resources could be easily overwhelmed. Unfortunately, miscarriages of justice are not uncommon, and many convictions have been overturned due to new DNA evidence proving innocence. Some innocent individuals have even been wrongfully executed. Therefore, even seemingly guilty offenders deserve the full protection the justice system can offer, and having a competent defense attorney can be the determining factor between life and death for the accused.

Those who criticize the due process perspective argue that the legal privileges granted to criminal suspects have gone too far, potentially interfering with public safety. They question whether it is fair to suppress evidence obtained through illegal searches, even if it means a guilty person goes free. However, it is important to consider that some individuals who appear guilty may be victims of flawed justice. Thus, the risk of convicting innocent people remains a troubling possibility.

Non-intervention Perspective

This perspective emphasizes limiting the involvement of the criminal justice system in individuals' lives, particularly for nonviolent offenses. It believes in minimizing the stigmatization and negative consequences associated with criminal convictions.

Its supporters believe that justice agencies should limit their involvement with criminal defendants. Regardless of whether intervention is designed to punish people or to treat them, the ultimate effect of any involvement is harmful. Whatever their goals or design, programs that bring people in contact with a social control agency—such as the police, a mental health department, the correctional system, or a criminal court—will have long-term negative effects. Once involved with such an agency, criminal defendants may be watched, people might consider them dangerous and untrustworthy, and they can develop a lasting record that has negative connotations. Bearing an official label disrupts their personal and family life and harms parent–child relationships. Eventually, they may even come to believe what their official record suggests; they may view themselves as bad, evil, outcasts, troublemakers, or crazy. Thus, official intervention promotes, rather than reduces, the tendency to engage in antisocial activities.

Equal Justice Perspective

This perspective strives to eliminate discrimination and bias within the criminal justice system. It advocates for fair treatment regardless of race, ethnicity, religion, gender, or socioeconomic status.

It asserts that all people should receive the same treatment under the law. The discretion routinely employed in criminal justice making has created a system of individualized justice that can be unfair, and that unfairness undermines the goals of the system. Frustration arises when two people commit the same crime but receive different sentences or punishments. The resulting anger and sense of unfairness will increase the likelihood of recidivism.

Restorative Justice Perspective

This perspective seeks to repair the harm caused by crime by involving victims, offenders, and the community in a healing process. It emphasizes accountability, reconciliation, and restoring relationships instead of solely focusing on punishment.

The true purpose of the criminal justice system is to promote a peaceful and just society; the justice system should aim for peacemaking, not punishment. The restorative justice perspective draws its inspiration from religious and philosophical teachings ranging from Quakerism to Zen. Advocates of restorative justice view the efforts of the state to punish and control as “crime encouraging” rather than “crime discouraging.” The violent punishing acts of the state, they claim, are not unlike the violent acts of individuals. Therefore, mutual aid, not coercive punishment, is the key to a harmonious society. Without the capacity to restore damaged social relations, society’s response to crime has been almost exclusively punitive.

Rehabilitation Perspective

The rehabilitation perspective focuses on reforming offenders to prevent future criminal behavior. It emphasizes education, counseling, and vocational training to help offenders reintegrate into society successfully.

Herbert Packer’s Criminal Justice Model

As far as criminal justice is concerned, there is a delicate balance between public safety and individual freedoms, which has been a struggle for law enforcement. Such issues become salient much especially after the 9/11. As Sandra Day O’Connor, the retired United States Supreme Court justice, said: *‘We are likely to experience more restrictions on our personal freedom than has ever been the case in this country, the US.* As the framework for differing views of criminal justice, the crime control / due process model has been first suggested by Herbert Packer (Packer, 1968: 80). According to this model, basically, there are two lines: Strong law enforcement and protection of civil liberties in the Criminal Justice System. (Grant, Karen, 2005: 35). Let’s look at these perspectives in detail here.

Crime Control Perspective

According to this perspective, the primary objective of the justice system is to protect society, achieved through more effective police protection, harsh criminal penalties, and the incapacitation of repeat offenders. To enhance effectiveness, crime control advocates seek to eliminate legal barriers that could aid criminals in escaping punishment. They argue against legal technicalities that might allow the guilty to go free and hinder justice. For instance, they advocate for the removal of legal restrictions on law enforcement actions. In some cases, this might involve using tactics that limit civil liberties, such as racial or ethnic profiling at airports to identify and apprehend suspected terrorists. Over time, the crime control model has become the prevailing approach to justice, shaping public attitudes toward crime and its management. As a result, the American public generally holds punitive views toward criminals, with a significant majority supporting the availability of the death penalty.

Crime control can be defined as an approach which accepts *strong law enforcement* in a criminal justice system. Therefore, those who defend *crime control* approach aim to ensure that suspects are processed as quickly and efficiently as possible; emphasize the importance of attempting to distinguish between the innocent and the guilty at the pre-charge stage; assume that once a suspect is formally charged, he/she can be processed on the basis of an informal *presumption of guilt*; prefer guilty pleas to lengthy hearings and trials, and also prefer informal methods of disposal over legalistic procedures.

Unsurprisingly, maybe in the world, the police and other law enforcement agencies are the most vocal supporters of a crime control approach to criminal justice system. Therefore, the following are seen as vital to the effective functioning of the criminal justice system: Extensive police powers, Limited rights for suspects, Greater emphasis on pretrial processes. However, we must be careful of the potential dangers because it might undermine rule of law, legitimacy of law enforcement, criminal justice system in a society.

Due Process Perspective

The concept of *due process* can be defined as an approach which accepts the protection of human rights and civil liberties in the criminal justice system. In other words, it can be broadly defined as protection from arbitrary or unfair proceedings against individuals by the criminal justice system. The concept of *due process is central to fundamental human rights* because it requires equal protection for all individuals. For instance, the impartiality of the judge during a trial, being able to present evidence by the defendant on his or her own behalf and being presumed innocent until proven guilty based upon the evidence presented.

There are two kinds of due process: *Substantive due process*, and *procedural due process*. Substantive due process protects against arbitrary or unfair laws. Procedural due process protects individuals from arbitrary and unfair *application* of the laws. Most due process cases heard by the courts relate to issues of procedural due process such as police entrapment.

Therefore, those who defend *due process* approach argue that criminal justice system must keep the rights of the innocent and ensure that only the guilty are punished; Maintain that safeguards are necessary to protect individual rights and to ensure that the wrongful convictions is kept to minimum, despite the fact that the criminal justice system primarily aims to reduce and prevent crime; See the idea that 'better that ten guilty men go free than one innocent man be punished' is central to the due process approach; Favor considerable restrictions on policing; Are suspicious of informal processes; View the criminal trial as the most reliable method of determining guilt.

There has been tension between the two perspectives, namely, *crime control and due process*. In the 60s, in the US and Europe, the civil rights movement increased the public consciousness about individual rights and placed pressure on the criminal justice system to develop *due process*. Regarding

this, for example, *Miranda v. Arizona* and *Terry v. Ohio* cases, and the European Court of Human Rights restricted the powers of the police and emphasized the rights of suspects. However, after the 80s, there was a shift towards the crime control approach as the crime rates increased. According to defenders of crime control approach, the rise in crime was the direct result of an overemphasis on suspects' rights and wanted to increase police powers. Today especially after the 9/11, crime control values still prevail in the world because of the global war on terrorism. Unfortunately, Turkey was a country looking for the balance between *crime control* and *due process*, but it has entered the unbalanced criminal justice system since decade. The retrogressive policies for struggling with terrorism and stepping back from the EU process are the major determinants for the unbalanced system.

The Importance of Criminal Justice System and the OSCE

Having a non-military doctrine, the OSCE is a civilian based security organization in the Eurasian area. Its main characteristic is that all issues including human dimensions and human rights, economics, scientific issues, political, and security issues are inter-related to each other. They are the key to Eurasian security towards its peace-keeping and peace-making functions. (Karaosmanoglu, 2002: 23). In other words, it is the only Eurasian forum where all issues from human rights to security in the area are discussed, and where periodic meetings are held to reach consensus-based decisions in various areas including human dimension issues.

In the year 2006, the Office for Democratic Institutions and Human Rights (ODIHR) chose the topic, *the rule of law and Due process in Criminal Justice Systems* to discuss accountable and responsive policing in the human dimension seminar. Even though in every country a small percentage of the population is involved in the criminal justice system, we all recognize that the way a criminal justice system functions plays a key role in how every society organizes their legal system and their government.

Having the four pillars of every criminal justice system, namely, judges, law enforcement officials, prosecutors and defense lawyers, the criminal justice system has an impact on security not only in the narrow sense but also in the sense of the OSCE's comprehensive security conception. There exists no one criminal justice system or model in the Eurasian area. Differences between the legal systems of the member states are also considerable.

Discussions on Accountable Policing in the OSCE

Accountable policing in upholding the rule of law and due process in criminal justice system is thus a crucial stage at which the OSCE reached. The reason is clear: Democratic policing and law enforcement, broadly speaking, the criminal justice system has a significant role in democratic countries. On the other hand, the fundamental rights including the right to life, the right to liberty and security, and the prohibition of torture are of paramount importance to all individuals, whether citizens or not, as well. So, the effectiveness of everyday policing and law enforcement matters greatly to the strength of popular support for democratic institutions and the rule of law.

On the other hand, the Council of Europe already has some useful framework for the police functions in a democratic society. For example, the European Code on Police Ethics: Recommendation (2001) 10 contains guidelines and principles. Regarding accountability and control of the police, the code says that the police shall be accountable to the state, the citizens, and their representatives. They shall be subject to efficient external control. State control of the police shall be divided between the legislative, the executive and the judicial powers. Public authorities shall ensure effective and impartial procedures for complaints against the police. Accountability mechanisms, based on communication and mutual understanding between the public and the police, shall be promoted. Codes of ethics of the police, based on the principles set out in the present recommendation, shall be developed in member states, and overseen by appropriate bodies (Council of Europe, 2021:12).

A police code of ethics can work as a regulatory instrument for the internal organization of the police. This is one of the striking features of the European Code of Police Ethics. By providing minimum standards, values, and ethical frameworks, it may serve a regulatory function in at least four ways: a) Maintain quality control of the personnel of the police organization, b) Help in the exercise of leadership, management and supervision, c) Make senior members of the organization more accountable, d) Provide a norm for the adjudication of difficult, internal disputes. Besides, the 12th Criminological Colloquium (1999) findings devoted to police powers and accountability in a democratic society. The Council for Police Matters (PC-PM), a subordinated body to the European Committee on Crime Problems, decided to give further reflection on this issue in its future work (Contribution of the Council of Europe, 2006: 5).

We are not likely to avoid criticism on the part of the non-governmental organizations and individuals whose rights may have been violated in any way by the criminal justice system. Occasionally, the rights of individuals are infringed upon or restricted due to errors, inaction or misconceived decisions taken by the authorities. Furthermore, we are aware of instances of interference by the executive branch in the work of the judiciary, of attempts to violate the independence of judges and undermine their competencies.

Criticism by NGOs and civil society can only help us understand the problem better, enhancing the confidence of individuals in states. According to the Church of Scientology International European Human Rights Office, repressive measures such as 'Awareness' seminars for judges and prosecutors, and discriminatory laws allowing biased groups subsidized by the state to intervene in criminal proceedings have undermined the OSCE's institutional framework. In the past, such measures was taken in the form of Ministry of Justice and Ministry of Interior Circulars in France (Submission from Church of Scientology International, 2006: 1)

Democratic Accountability and Police

There is a difference between democratic responsibility and democratic accountability. In the dictionary, the term "accountability" is used more broadly than "responsibility". It includes not only responsibility but also expresses that those who make action or decision should be ready to show that their actions or decisions are necessary (Sinclair, 1987: 10). That is the reason why *accountability* is the consequence of the understanding of openness and transparency.

The accountability issue is therefore an important underpinning of democratic policing. In other words, the democratic accountability of the police forces in the participating states is the key in keeping the stabilization and the security in the OSCE area. The police should therefore be accountable to the parliament, accountable to the executive, accountable to the judiciary, and accountable to the public and people.

In my opinion, if we look at the democratic accountability of the police forces from the national level, we can see that the issue is going around the accountability to the public and people because it does not seem any problem with the classic state powers-related bodies such as courts, commission in a parliament, supervision in the bureaucracy. I mean every participating state in the OSCE has such bodies to which the police force is accountable as well. If so, regarding accountability to the public and people, we must ask ourselves, what kind of mechanisms should we have really? We must bear in mind that such mechanisms are directly concerned with individual rights and freedoms as well such as the right to freedom of media, the right to effective remedy, the right to pursue the rights etc. It is important therefore to have mechanisms at the national level, concerning the media, the complaint review boards, the ombud, the international court such as the ECHR etc.

I understood from the first day sessions in 2006 that some countries including the Russian Federation have the ombud system according to their law systems. The ombud system was on the agenda of Turkey, has been discussed for a long time, unfortunately then was ineffectively adopted because of

the lack of powers to reach at the binding decisions for those whose human rights have been violated. Besides, the recent report shows that members of civil society and non-governmental organisations should be able to perform a function of *civilian oversight* on security services (Cerrah, 2005: 5). There is also the Human Rights Commission in the parliament, the Turkish Grand National Assembly.

The concept of democratic accountability of the police forces is ultimately concerned with the outside supervision and examination of all the police law and activities and decisions (Alderson, 1994: 26). It refers also to the performance of police officers (Reiner, 1992: 46). Let us take *Selmouni* and *Satik* cases regarding arrest and custody before the European Court of Human Rights. The ECHR decided on such cases that all the European states parties to the European Convention on Human rights have a responsibility to make a *reasonable explanation* before the ECHR of why the persons in custody *have been injured*.

Besides, the ECHR has decided that all the European states should have *independent monitoring mechanisms* to ensure accountability due to the use of force including its proportionality (Karaosmanoglu, 2002: 65). Otherwise, in the trials before the ECHR, the governmental defense based on *just oral* rather than *material evidence* is not acceptable. That is the reason why, the United Kingdom and Turkey lost such cases before the ECHR, violating the Article 3 of the European Convention of Human Rights.

Conclusion

Today at the time when the future of the OSCE is being discussedⁱⁱⁱ, the ability of the organization should be reconsidered based on criminal justice and police accountability. All criminal justice perspectives might function well not only for the issue of accountable policing but also for the adoption of criminal justice mechanisms and tools. Understanding and appreciating different perspectives can help foster cooperation and peaceful resolutions to conflicts. The OSCE gives us a chance to be able to discuss what kind of criminal justice mechanisms and tools should be adopted effectively. It is valuable not only for the countries trying to build democratic institutions but also for those whose criminal justice systems are retrogressive or breakdown.

However, when doing this, criminal justice and accountable policing should not be looked at from one perspective, the due process, on the contrary, all criminal justice perspectives. The other perspectives rather than the due process are also significant especially for adoption of various criminal justice tools. Let us take, for example, non-intervention one: I think we need a criminal justice tool preventing individuals from stigmas. Police accountability is related to international level as well, as participating states, it seems to me that we should also consider the establishment of an OSCE Court specialized on allegations concerning police activities-related individual rights. Such rights include the right to liberty and security, the right not subject to torture, the right to life etc.

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ⁱⁱ The OSCE Secretary General Helga Schmid joined the Event (Live Webcast), The Current Challenges and Future of the OSCE on July 26, 2023, 11:00 am-12:00 pm ET, 6th Floor Flom Auditorium, Woodrow Wilson Center, Global Europe Program.